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suit was time-barred, having been brought after three years from the date of its execution. This view of the learned Judge appears to us to be erroneous. The claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction. If this was so, there was no necessity for the plaintiff to have the deed set aside, and therefore article 91 of the second schedule to the Limitation Act had no application. This was so held by the Calcutta High Court in *Sham Lall Mitra* v. *Amarendro Nath Bose* (1). We may also refer to the recent ruling of their Lordships of the Privy Council in the case of *T. P. Petherpermal Chetty* v. *R. Muniandy Servay* (2). If article 91 was applicable, the learned Judge should also have determined when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. This he has not done. As the suit was dismissed on a preliminary ground, and in our opinion that ground is untenable, we allow the appeal, set aside the decree of the Court below and remand the case to that Court under section 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it according to law on the merits. The appellant will have his costs of this appeal. Other costs will follow the event.

Appeal decreed and Cause remanded.

APPELLATE CRIMINAL.

1908
May 15.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

EMPEROR *v.* LACHMI NARAIN.*

Act No. XII of 1896 (*Excise Act*), *sections* 44 (2), 48 *and* 57—*Definition*—*Excise Officer*—*Jurisdiction.*

Held that a head constable is an Excise Officer within the meaning of section 57 of the Excise Act, 1896. *Queen-Empress* v. *Makunda* (3) followed.

On the 11th of September, 1907, one Lachmi Narain was arrested in the Bisraint Bazar, Muttra, by a head constable and a constable on suspicion of having illicit charas in his possession.

* Criminal Appeal No. 276 of 1908, from an order of H. W. Lyle, Sessions Judge of Agra, dated the 9th of November 1907.

(1) (1895) I. L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.
(3) (1897) I. L. R., 20 All., 70.

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On his being searched, some eighteen tolas of charas were discovered tied up in an angochha round Lachmi Narain's waist. Lachmi Narain was taken to the Kotwali, and after some further investigation a report was made by the Sub-Inspector to the Joint Magistrate of Muttra. On this report Lachmi Narain was charged with and convicted of an offence under section 48 of the Excise Act, 1896, and sentenced to three months' rigorous imp[illegible]ment and a fine of Rs. 40. Lachmi Narain appealed to the S[illegible]ns Judge, who set aside his conviction and sentence upon the gr[illegible]d that under section 57 of the Act no Court could take cognizanc[illegible] an offence under the Act except on a complaint or report of an [illegible]se Officer. This was an appeal by the Local Government again[illegible]he order of acquittal passed by the Sessions Judge of Agra.

The Government Advocate (Mr. *A. E. Ryves*) for the Crown.

Babu *Satya Chandra Mukerji*, for Lachmi Narain.

KNOX and AIKMAN, JJ.—This is an appeal by the Local Government from an appellate judgment of acquittal passed by the learned Sessions Judge of Agra. The accused was convicted by a Magistrate of the first class of an offence under section 48 of Act No. XII of 1896. He was sentenced to the maximum term of imprisonment prescribed by the section and to a fine of Rs. 40. On appeal the conviction and sentence were set aside by the learned Sessions Judge of Agra on the ground that under section 57 of the Act no Court can take cognizance of an offence under the Act except on a complaint or report of an Excise Officer. According to the evidence for the prosecution the accused was arrested with eighteen tolas of *charas* in his possession by a police constable and a head constable. They through their official superior brought the case for trial before the Magistrate. The learned Judge held that the police could not institute the proceedings, and that they could only be instituted by an Excise Officer, which term, the learned Judge holds, means the Excise Inspector, or, where there is no such officer in the District, the Collector or Assistant Collector in charge of excise. In our opinion the view taken by the learned Judge is erroneous. He overlooked the provisions of section 44, sub-section (2) of the Act. The learned Government Advocate has called our attention to the

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ruling in *Queen-Empress* v. *Makunda* (1), which fully supports the view for which he contends. We have heard what the learned vakil who appears for the accused could say on his client's behalf. We have also read the evidence. In our opinion it clearly proves an offence under section 48, clause (*e*) of the Excise Act, 1896. We were addressed on the question of sentence. It is apparently the first time that Lachmi Narain has been convicted. He has already been upwards of three weeks in jail and he has paid the fine which was imposed on him. We accordingly allow this appeal, and, setting aside the judgment of acquittal, convict Lachmi Narain of the offence specified above. We sentence him to the term of imprisonment which he has already undergone, and to the fine which he has already paid.

REVISIONAL CIVIL.

1908
May 18.

Before Mr. Justice Aikman and Mr. Justice Griffin.

ANANDI KUNWARI (JUDGMENT-DEBTOR) *v.* AJUDHIA NATH (AUCTION-PURCHASER).*

Civil Procedure Code, sections 310*A*, 244 *and* 588—*Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction-purchaser representative of judgment-debtor, not of decree-holder.*

A purchaser at an auction sale in execution of a decree is the representative of the judgment-debtor, not of the decree-holder. *Manickka Odayan* v. *Rajagopala Pillai* (2) dissented from.

Where therefore a judgment-debtor's application under section 310A of the Code of Civil Procedure had been allowed, it was *held* that no appeal by the auction purchaser would lie, inasmuch as no appeal was given by section 588, nor did the case fall within the purview of section 244 of the Code. *Bashir-ud-din* v. *Jhori Singh* (3) followed. *Kuber Singh* v. *Sahib Lal* (4), *Gulzari Lal* v. *Madho Ram* (5). *Maganlal Mulji* v. *Doshi Mulji* (6) and *Raynor* v. *The Mussoorie Bank Limited* (7) referred to. *Imtiazi Begam* v. *Dhuman Begam* (8) dissented from.

THE facts of this case are as follows :—

One Magan Sahu obtained an *ex parte* decree against Musammat Anandi Kunwari on the 17th of September 1903. In execution of that decree a house was advertised for sale on the

* Civil Revision No. 75 of 1907, from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 25th of May 1907.

(1) (1897) I. L. R., 20 All., 70.
(2) (1907) I. L. R., 30 Mad., 507.
(3) (1896) I. L. R., 19 All., 140.
(4) (1904) I. L. R., 27 All., 263.
(5) (1904) I. L. R., 26 All., 447.
(6) (1901) I. L. R., 25 Bom., 631.
(7) (1885) I. L. R., 7 All., 681.
(8) (1907) I. L. R., 29 All., 275.